

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Regulations Establishing : Docket No. RM2007-1
System of Ratemaking :

JOINT COMMENTS OF AMERICAN BUSINESS MEDIA, GREETING CARD
ASSOCIATION, AND NEWSPAPER ASSOCIATION OF AMERICA
WITH RESPECT TO THE COMPLAINT PROCESS

In response to the Commission's Advance Notice of Proposed Rulemaking in this Docket (Order No. 2, January 30, 2007), American Business Media, Greeting Card Association, and Newspaper Association of America ("Joint Commenters") submit the following comments concerning the complaint process mandated by 39 U.S.C. § 3662, as amended by the Postal Accountability and Enhancement Act of 2006 ("PAEA"). Although the Advance Notice does not include 39 U.S.C. § 3662 among the statutory sections quoted, the Joint Commenters strongly urge the Commission to propose and ultimately to adopt appropriate rules to create an effective, available, and adaptable complaint process.

Importance of the problem. Under the 1970 Act, the complaint was a distinctly secondary means of enforcing the public's right to rates and classifications complying with the statutory commands. No new or changed rate, and no classification change, could be implemented without prior review by the Commission. For this reason, most issues could be raised and decided before the rate or classification change became effective. Indeed, only a handful of rate

and classification complaints seeking recommended decisions¹ occurred during the 36 years since the passage of the 1970 Act.

Under the Postal Accountability and Enhancement Act (PAEA), the situation has changed dramatically. First, prior review of rate changes now is limited to a brief period (45 days).² While there could, and should, be opportunity for public input during this review, it is clear that any issue requiring significant fact finding procedures or legal debate would have to await a subsequent proceeding, most likely under § 3662. Thus the protection of public rights, formerly vindicated by prior-review proceedings under former §§ 3622 and 3623, must now be afforded through the complaint process.

Complaints are also a more important mechanism under PAEA because their potential scope is broader than under the 1970 Act. A complaint now may allege contravention of 39 U.S.C. §§ 101(d), 401(2), 403(c), 404a, 601, or any provision of chapter 36, as well as “regulations promulgated under any of those provisions.”

The Commission’s current complaint rules³ reflect the narrower scope of the complaint mechanism under the 1970 Act. Thus, for example, 39 CFR § 3001.82 authorizes parties “who believe the Postal Service is charging rates which do not conform to the policies set out in the Act, or . . . that they are not receiving postal service in accordance with the policies of such title” to file complaints. Its limitation to rate (and, in practice, to some classification) problems would exclude much of the coverage of the revised § 3662. The same section of the rules generally excludes “individual, localized, or temporary service

¹ Questions of service quality, even if well-founded, could result only in a “public report” essentially addressed to the Postal Service’s discretion.

² 39 U.S.C. § 3622(d)(1)(C).

³ 38 CFR Part 3001, Subpart E.

issue[s] not on a substantially nationwide basis” as grounds for a proper complaint; yet creation and enforcement of “modern service standards” is clearly part of ch. 36 as revised by PAEA, and as such falls within the scope of the complaint provision.⁴ These limitations are understandable as implementations of the 1970 Act, where most questions could be dealt with in the prior review of rate and classification changes. But under PAEA, the complaint procedure is no longer a secondary or backup mechanism; it is mailers’ most prominent defense.

Similarly, the present complaint rules are geared to the two outcomes provided for by the 1970 Act: a recommended decision to the Governors for rate and classification issues, and a “public report” for service issues.⁵ Since PAEA makes Commission decisions under § 3662 final, subject to court review, the current rules are structurally obsolete as well.

Consequently, the Joint Commenters urge the Commission to treat the development of rules for a new, effective and robust complaint process as a first priority in this Docket.

Goals. PAEA clearly implies certain goals that the complaint process rules should achieve.

1. *A meaningful opportunity to be heard.* The statute calls upon the Commission to determine whether a complaint “raises material issues of fact or law”⁶ and, if it does, to begin proceedings on it. Because PAEA recasts the ratepaying public’s right to challenge and the Commission’s power to remedy

⁴ See particularly 39 U.S.C. § 3691(d): “The regulations promulgated pursuant to this section (and any revisions thereto), *and any violations thereof*, shall be subject to review upon complaint under sections 3662 and 3663.” (Italics added.)

⁵ See particularly 39 CFR §§ 3001.85 through 3001.87.

⁶ 39 U.S.C. § 3662(b)(1)(A)(i).

departures from statutory requirements in a substantially different form, the Commission should construe this standard generously – both by rulemaking, to the extent that it chooses to clarify the standard by rule, and in its future determinations under the “material issues” provision.

For example, a complaint might advance an interpretation of some relevant statutory provision that has not yet been authoritatively construed. The Postal Service may have relied, explicitly or not, on an opposite interpretation in taking the action being challenged. Assuming that the complainant’s proposed interpretation is a reasonable one, the complaint should be treated as raising a material issue of law, previous Postal Service practice notwithstanding.

A special problem is presented by PAEA’s deferential treatment of data considered by the Postal Service to be confidential.⁷ The Joint Commenters here assume that appropriate discovery rules⁸ will be put in place, so that once a complaint has been set for Commission proceedings the complainant will be able to obtain otherwise confidential information needed to litigate the case. The more difficult question is how to insure that a complaint will not be dismissed for failure to raise material issues of law or fact because the data that would show that such issues exist are being held confidential.

Clearly, the first appropriate precaution is to judge the materiality of the issues a complaint raises in light of the fact that much relevant data is unavailable to the complainant. This unavailability could stem from several causes. It might be confidential; or simply not included in public reports. Even if the data were of a nature that would be included in a public report, no public report covering the relevant period might yet have been filed. In these situations, a complainant must obtain data in the proceeding itself. The

⁷ See 39 U.S.C. §§ 504(g); 3652(e), (f).

⁸ That is, rules, based on F.R.Civ.P. Rule 26(c), which satisfy 39 U.S.C. § 504(g)(3)(B).

complainant may reasonably be expected to make, and to show that it has made, due efforts to obtain any data needed to indicate that a material issue exists. But no complaint should be dismissed only because the complainant has not made a prima facie case within the four corners of the complaint.

The concept of the prima facie case may indeed be useful under § 3662: the Commission might find it beneficial to enact a rule, or establish a policy, whereby the complainant's establishing a prima facie case shifts to the Postal Service the burden of justifying the rate, classification, or other action complained of.⁹ But this question is totally distinct from the issue of what a complainant must say or do in order to raise "material issues of fact or law." The Commission should maintain the distinction and insure that in order to be set for proceedings a complaint need show no more than what the statute requires – that it fairly raises a material factual or legal issue.

2. *Assurance that complaint proceedings will not be artificially curtailed.* Section 3653 of title 39 requires the Commission, after receiving the Postal Service's annual reports, to determine (i) whether its rates and fees were in compliance with chapter 36 and regulations implementing it, and (ii) whether any service standards were not met. Sections 3653(b) and (c) provide for findings of "no noncompliance" and "noncompliance," respectively. But § 3653 is silent on the relationship between the actions it prescribes and any complaint pending at the time they must be taken.

⁹ For example, a party complaining that a public utility's incurrence of a cost, passed through in rates, was legally imprudent may be required to present evidence raising "serious doubt that a reasonable utility manager, under the same circumstances and acting in good faith, would not have made the same decision and incurred the same costs. . . . If the petitioner clears this initial hurdle, the utility has the burden of presenting evidence sufficient to dispel those doubts." *Indiana Municipal Power Agency v. FERC*, 56 F.3d 247, 253 (D.C. Cir. 1995).

It seems clear that if the Commission, by setting a complaint for proceedings, has agreed that it raises material issues as to noncompliance with chapter 36, it cannot consistently issue a § 3653(b) determination of “no noncompliance” before the complaint case has been decided. Doing so would turn the complaint process into an empty ritual – particularly because the Postal Service, and any parties aligned with it, would have strong incentives to delay the proceeding until the rates complained of had been superseded. If the § 3653 process led the Commission to find the same noncompliance alleged in the complaint, the Postal Service would be no worse off than if the complaint process had proceeded without interruption. In that case, the Commission might simply dispose of the matter in the most prompt and efficient manner possible (since the remedy could be identical under §§ 3653 and 3662). But if the § 3653 review – ignoring the pending complaint – were to eventuate in a finding of “no noncompliance,” it is unclear whether this determination could be used to block further proceedings on the complaint, or at least to prescribe its outcome.¹⁰ Such an interpretation, however, would tend to thwart rather than advance the objectives of the legislation. The prospect of blocking a complaint proceeding, or dictating its outcome, via the § 3653 review process would be a powerful incentive for opponents of the complaint to delay proceedings on it, and could lead parties having legitimate grounds for complaint to file prematurely in order to avoid being cut off by the annual review. The Commission should make it clear that the § 3653 review will not have such consequences for a complaint, at least absent extraordinary circumstances (which the party advocating curtailment of the complaint would be charged with demonstrating).

¹⁰ Section 3653 can (though it should not) be read restrictively, as requiring that the noncompliance determination be based on nothing but the Postal Service’s reports and the comments filed under § 3653(a). What, if any, use the Commission could make of record material developed in an as yet uncompleted complaint proceeding is not entirely clear, but the statute does not appear to preclude such utilization, and procedural economy would argue strongly for it.

The Joint Commenters suggest that the Commission provide in its rules for a suitable reconciliation of §§ 3653 and 3662 – that is, one that preserves the effectiveness and utility of both provisions. One method would be to create a subcategory of “noncompliance” determinations under § 3653(c), whereby the Commission reserves the power to make a later noncompliance finding as to the subject matter of a pending complaint, once that case is decided. Alternatively, if no noncompliance other than the matters alleged in the complaint appears from the reports and § 3653(a) comments, the Commission could make a “no noncompliance” determination that is expressly subject to the outcome of the complaint proceeding.¹¹ However the reconciliation is managed, the Commission should take care that §§ 3652 and 3653 do not become an unintended means of short-circuiting the complaint process.

3. *An expeditious procedure.* It is to no one’s advantage to have a rate or classification kept subject to uncertainty by a needlessly long complaint proceeding. The Postal Service, which is likely to be planning for its next periodic rate adjustment, will need to know whether the existing rate or classification will be changed by a Commission order. A complainant ultimately found entitled to relief should, obviously, obtain it as soon as possible; even one whose complaint is unsuccessful may well need to implement “Plan B” as quickly as it can.

The Commission is apparently free to devise procedures that will allow § 3662 cases to proceed swiftly, while giving all parties adequate opportunity to present their own cases and challenge opposing contentions.

¹¹ This course might be attractive if the Commission believes § 3653 requires it to make every possible noncompliance/no-noncompliance determination within the statutory 90 days. (The Joint Commenters’ view, however, is that the latitude which § 3622 gives the Commission in setting up the ratemaking system is sufficient to allow exceptions to the 90-day rule for pending complaints.)

First: It is well understood that, throughout the decade of postal reform efforts on Capitol Hill, the Postal Service took the approach – one that is standard for a regulated entity – that less regulation is preferable to more regulation and that it would up subject to greater regulatory scrutiny than it would have liked. Joint Commenters assume that the Postal Service will respond accordingly by pressing against or crossing over the boundaries established in PAEA, if at all, only infrequently and only when it believes that its actions can be defended successfully, or where novel statutory boundaries are still unclear. Furthermore, the Commission should consider that the task of gathering facts in support of a rate or classification complaint, drafting and filing a complaint that raises issues of fact or law sufficiently robust to withstand summary dismissal, and pursuit of a complaint that is set for further proceedings through to a decision is an onerous and costly one. No mailer or other entity would assume that burden lightly.¹²

For these reasons, Joint Commenters submit that the Commission should proceed on the assumption that it will not be required to deal with a flood or even a constant stream of complaints. Should this assumption prove to be incorrect, of course, the Commission is always free to modify its procedures, if necessary.

So far as expeditious procedural methods are concerned, the Joint Commenters suggest, first, that since trial-type hearing procedures are no longer required by statute¹³, the Commission could devise a “paper hearing” procedure

¹² Experience under other regulatory statutes is instructive. For well more than a decade, the Federal Energy Regulatory Commission has authorized the electric utilities it regulates to charge wholesale rates for power and energy without the need to file cost support, subject to ratepayers’ right to file complaints. There have been very few such complaints, even though FERC regulates scores of electric utilities across the country. Similarly, the Federal Communications Commission has entertained comparatively few rate complaints since it replaced rate of return regulation of the largest regulated carriers with a price cap system.

¹³ As they were under the 1970 Act (where § 3662 required “proceedings in conformity with section 3624”).

in which verified statements and written discovery against them would be the main (and in most cases, perhaps, the only necessary) method of assembling the factual record.

Expedition would also be served by appropriate balance of the Postal Service's rights regarding confidential data filed with the Commission with complainants' need to find and present information supporting their claims.

The Commission could also employ preliminary conferences, once a complaint is set for proceedings, in order to narrow both the ultimate issues and the disputed questions of fact, and to make efficient arrangements for the treatment of any confidential data.

4. *Conclusion.* Joint Commenters believe strongly that no rate-setting system under PAEA can be successful in meeting all of the goals of that statute without a complaint process that protects the rights of mailers and other owners of the postal system, especially consumers of monopoly postal services. A workable complaint process will serve, in the long run, to make complaints less necessary. The Joint Commenters urge the Commission to move swiftly to consider, and adopt in a timely manner, procedures to implement the revised § 3662.

April 6, 2007

Respectfully submitted,

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